MOHD ALI ABDUL MAJID A

v.

MANOKARAN VERAYA

HIGH COURT MALAYA, KUALA LUMPUR B
HAS ZANAH MEHAT JC
[CIVIL APPEAL NO: R4-12B-322-09]
25 APRIL 2011

CONTRACT: *Illegality - Sale and purchase agreement - Whether void for illegality - Failure to plead illegality - Whether relevant - Contracts Act 1950, s. 24* C

CONTRACT: *Limitation - Contractual term - Failure by vendor to exercise option to terminate agreement - Liability to refund deposit - Whether upon refusal to return deposits - Whether purchaser's action for refund time barred* D

CONTRACT: *Sale and purchase of property - Breach - Resale of property to third party when first agreement still subsisting - Whether vendor failed to comply with termination clause under agreement - Whether vendor breached agreement* E

CONTRACT: *Sale and purchase of property - Deposit - Forfeiture of - Claim for refund - Whether vendor entitled to forfeit deposit - Whether agreement terminated - Whether failure to terminate according to clause in SPA rendered time for completion enlarged* F

The plaintiff ('purchaser') entered into an agreement ('the SPA') with the defendant ('vendor') to purchase a property on 15 February 1995. The purchase price was RM1.1 million and another RM400,000 for the fixtures and fittings in the property. Pursuant to the SPA, the plaintiff paid a total of RM230,000 towards the purchase price. The plaintiff subsequently informed the defendant that he was unable to pay the balance purchase price. The defendant therefore informed the plaintiff that he could refund the deposit after the disposal of the property to a new buyer and made a partial refund of RM40,000. However, the plaintiff later discovered that the defendant had sold the property to a third party although the SPA was not terminated pursuant to cl. 9 of the SPA. Hence, the plaintiff filed a suit for the recovery of the balance deposit in the sum of RM190,000 from G H I

A the defendant on the ground that the defendant did not give the plaintiff written notice of termination of the SPA and therefore the plaintiff was not entitled to forfeit the deposit paid by the plaintiff. The defendant, on the other hand, claimed that the SPA was terminated when the plaintiff failed to pay the balance purchase B price and thus entitled to forfeit the deposit. The Sessions Court dismissed the plaintiff's claims and hence this appeal. The issues for the court's consideration were, *inter alia*: (i) whether the plaintiff was in breach of cl. 2(a) of the SPA and therefore the vendor was entitled to forfeit the deposit without invoking the C termination clause in cl. 9; (ii) whether the SPA had been terminated by itself due to the operation of the terms of the SPA and as such the defendant was entitled to sell the property to a third party; (iii) whether the SPA was illegal and therefore void pursuant to s. 24 of the Contracts Act 1950 (the CA); and (iv) D whether the plaintiff's claim was time barred.

Held (allowing the plaintiff's claim with costs):

(1) The operative words in cl. 9 of the SPA was "... this E agreement may be terminated by the vendor ...". Based on this, unless and until the defendant invokes cl. 9 by issuing termination notices in writing served by prepaid AR Registered posts (as provided in the SPA), the agreement shall be deemed to subsist and continue and time becomes at large. F There was no evidence that the letter of termination and notice of forfeiture was issued by the defendant and therefore the SPA was still subsisting when the defendant entered into the second SPA with the new purchaser. In the circumstances, the defendant was not entitled to forfeit the G deposit and also had no right to resell the property to a third party as he did not exercise his right to terminate as per the requirement of cl. 9. (paras 16, 17 & 22)

(2) Based on the evidence, the defendant's failure to exercise his option to terminate the SPA caused the time for completion H enlarged and the SPA still alive when the defendant sold the property to the third party. Therefore, the defendant was in breach of the SPA when he sold the said property to the third party when the SPA was still in force. (para 26)

I **(3)** The reason the plaintiff did not rebut or challenge the defendant's allegation of illegality during cross-examination was because the defence of illegality was not pleaded and was

therefore not relevant and hence there was no reason to rebut the allegation. Based on the case of *Anjalai Ammal & Anor v. Abdul Kareem*, the learned trial judge had erred in holding that the SPA was void for illegality pursuant to s. 24 of the CA. (paras 35 & 36)

(4) The agreement was still subsisting because of the defendant's failure to exercise the option to terminate the agreement. In the circumstances, the liability to refund the deposit to the plaintiff occurred on or after the date when the defendant refused, failed and/or neglected to return the deposit back to the plaintiff. Therefore, the plaintiff's action was not barred by limitation. (paras 39 & 41)

Case(s) referred to:
Anjalai Ammal & Anor v. Abdul Kareem [1968] 1 LNS 8 FC ***(foll)***
Lee Tee & Anor v. Seek Lai Neo & Anor [2000] 2 CLJ 761 CA ***(refd)***
Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***
Seven Seas Supply Co v. Rajoo [1965] 1 LNS 164 FC ***(refd)***
Soon Yee Ling & Anor v. Lim Ah Hun [2010] 2 CLJ 785 FC ***(refd)***
State Government of Perak v. Muniandy [1985] 1 LNS 117 SC ***(refd)***
The Great Eastern Life Assurance Co Ltd v. Indra Janardhana Menon [2005] 4 CLJ 717 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 24(b), (e), 56(1)

For the appellant/plaintiff - Surendran
For the respondent/defendant - Raj Kumar (Natarajan with him)

Reported by S Barathi

JUDGMENT

Has Zanah Mehat JC:

Introduction

[1] I have allowed the appeal by the appellant/plaintiff earlier. Now, I give my reasons for doing so.

[2] In this appeal the appellant (the plaintiff in the court below) appealed against the decision of the Session Court, Kuala Lumpur which decided in favour of the respondent (the defendant in the court below). In order to avoid any confusion I will refer to the parties as they were in the court below.

A **Background Facts**

[3] The plaintiff who is the purchaser agreed to purchase the defendant's (vendor) house held under Geran QTI 2921, Lot No. 319, Sek 38, Bandar Petaling Jaya, District of Petaling, Selangor
B Darul Ehsan (hereinafter referred to as 'the Property') at the purchase price of RM1.1 million. The sale and purchase agreement was entered into on 15.2.1995 (hereinafter referred to as "the SPA") and the purchase price stated therein is RM1.1 million (p. 96 record of appeal).

C **[4]** The plaintiff also agreed to pay the defendant another RM400,000 for the fixtures and fittings in the said Property (p. 106 of the record of appeal).

[5] The terms of the SPA state that the plaintiff is to pay a
D deposit of RM110,000 being 10% of the purchase price upon signing the SPA and the balance purchase price to be paid within 90 days from the date of the SPA.

[6] It is undisputed fact that the plaintiff paid the deposit of
E RM110,000 and a further sum of RM120,000 to the defendant towards the total purchase price for the said Property making it a total of RM230,000 that was paid by the plaintiff to the defendant (p. 116 of the record of appeal). However, the plaintiff was unable to pay the balance purchase price within the 90 days.

F **[7]** On or about 16 June 1995, the plaintiff informed the defendant that he was unable to pay the balance purchase price. The defendant could have terminated the SPA and forfeited the deposit but did not do so as it was agreed between parties vide
G letter dated 16 February 1996 where the defendant informed the plaintiff that he can refund the deposits paid by the plaintiff after the disposal of the said Property to a new buyer. The defendant made a partial refund of RM40,000 on or about 22 December 1995 (p. 107 record of appeal).

H **[8]** On or about 3 September 1996 the plaintiff discovered that the defendant had sold the said Property to a third party for the sum of RM1.65 million. At that point in time the SPA was not terminated pursuant to cl. 9 of the SPA.

I

[9] On or about 27 June 2002 the plaintiff filed a suit for the recovery of the balance deposit in the sum of RM190,000 from the defendant on the ground that the defendant did not give the plaintiff written notice of termination of the SPA and therefore the defendant is not entitled to forfeit the deposits paid by the plaintiff (p. 46 record of appeal).

[10] The defendant however claims that the SPA was terminated when the plaintiff failed to pay the balance purchase price and therefore is entitled to forfeit the deposit paid by the plaintiff (p. 52 record of appeal).

[11] On 2 March 2009 the Sessions Court dismissed the plaintiff's claims with costs. Hence, the appeal before this court.

Issues In This Appeal

[12] The following issues have to be considered in this appeal:

(i) Whether the learned trial judge in the court below was correct in finding that the plaintiff was in breach of cl. 2(a) of the SPA, therefore entitling the vendor to forfeit the deposits paid by the plaintiff without invoking the termination clause in cl. 9;

(ii) Whether the learned trial judge was correct in finding that the SPA had been terminated by itself due to the operation of the terms of the SPA and as such the defendant is entitled to sell the property to a third party;

(iii) Whether the learned trial judge was correct in her ruling that the SPA was illegal and therefore void pursuant to s. 24 of the Contracts Act 1950; and

(iv) Whether the learned trial judge was correct in her ruling that the cause of action accrued on 16 June 1995 and therefore the plaintiff's claim is time barred;

Court Decision

Whether The Plaintiff Is Entitled To Forfeit The Deposits Without Notice Of Forfeiture And The Spa Had Been Terminated By Itself Due To The Operation Of The Terms Of The SPA

[13] I shall consider the first and the second issue together as they are related. The terms in relation to forfeiture of deposits and termination are provided under cl. 9 and s. 2(b) to the Schedule

of the SPA (p. 99 and 105 of the record of appeal). However, we have to look at the provision as to the manner in which the payment of the purchase price has to be settled first. This can be seen in cl. 2(a) which states:

> The balance of the total purchase price in the sum specified in the Section 2(b) of the Second Schedule hereto (hereinafter referred to as "the balance sum") shall be paid or caused to be paid by the Purchaser to Messrs Mohd Ali Co, Advocates & Solicitors of 19A Jalan Telawi 3 Bangsar Baru 59100 Kuala Lumpur (hereinafter referred to as "the said Solicitors") **within Ninety (90) days from the date of this Agreement** provided the Vendor delivers the original documents which shall be necessary to remove all encumbrances (if any) and to effect the transfer to the said Solicitors without any delay. **The Purchaser (s) shall be entitled if he/they require a further extension of Thirty (30) days** provided he/they pays an interest on the balance purchase price at a rate of Ten (10%) per annum calculated on a daily basis to the Vendor.

Section 2(b) of Schedule 2 of the SPA states:

> The balance of the Purchase Price of the sum of RM990,000.00 shall be paid within Ninety (90) days from the date of the Agreement.

Clause 9 of the SPA states:

> In the event that the Purchaser fails to pay to the Vendor the balance sum or any part thereof in the manner and within the time stipulated in Section 2(b) of the Second Schedule thereto, this Agreement maybe terminated by the Vendor by notice in writing to the Purchaser whereupon the Vendor shall be entitled to forfeit absolutely the sum specified in Section 4 of the Second Schedule hereto as agreed liquidated damages but the Vendor shall forthwith refund to the Purchaser the sum (if any) equivalent to the difference between the total aggregate of all monies already paid by the Purchaser (and/or) pursuant to this Agreement to the date of such default less the aforesaid sum specified in Section 4 of the Second Schedule hereto and thereafter this Agreement and the Transfer shall be null and void and of no further force or effect and neither party hereto shall have any further rights and the Vendor shall be at liberty to sell or otherwise dispose of the said property at such price and in such manner and to such person or persons as the Vendor think fit.

[14] The learned trial judge in her grounds of judgment had said the following (p. 19 record of appeal).

> Adalah jelas dan diakui oleh Plaintif bahawa salah satu terma dalam perjanjian jualbeli iaitu penyelesaian baki jualan tidak dipatuhi oleh Plaintif pada waktu yang ditetapkan seperti dalam Seksyen 2(b) Jadual Kedua kepada perjanjian. Tiada keterangan untuk menunjukkan bahawa Plaintif telah memohon perlanjutan masa seperti yang dikehendaki oleh Klausa 2(a) perjanjian kepada Defendan. Kesimpulannya perjanjian jual beli itu tidak dapat disempurnakan kerana syarat di bawah Klausa 2(a) dibaca bersama dengan Seksyen 2(b) perjanjian jual beli itu tidak dipatuhi oleh Plaintif, maka Plaintif yang telah memungkiri perjanjian jual beli itu.

[15] The plaintiff submitted that the learned trial judge had erred in making a finding that since the plaintiff did not pay the balance purchase price on 15 May 1995 and since the plaintiff did not request for an extension of time as required by cl. 2(a), the agreement could not be completed and therefore the plaintiff is in breach of the SPA.

[16] It is my humble view that although cl. 2(a) of the SPA sets out the time frame for the payment of the balance purchase price which is 90 days from the date of the SPA, the learned trial judge however had failed to take into account that time was automatically extended by the conduct of the defendant in failing to exercise his right to terminate the SPA when the plaintiff (purchaser) failed to pay the balance purchase price within the 90 days. We should look at the operative words in cl. 9 of SPA which states that, "… this agreement maybe terminated by the vendor …". Therefore, unless and until the vendor (in this case the defendant) invokes cl. 9 by issuing termination notices in writing served by prepaid A.R. Registered posts (as provided in the SPA), the agreement shall be deemed to subsist and continues and time becomes at large (*Lee Tee & Anor v. Seek Lai Neo & Anor* [2000] 2 CLJ 761). In the cited case, the notice of termination was given but the trial judge held that it was not properly given and he held that the first agreement was not terminated and is still valid and effective. This finding was affirmed by the Court of Appeal in the following judgment of Mokhtar Sidin JCA (as he then was):

> In his judgment, the learned trial judge stated that two issues were raised before him at the trial:
>
> (i) whether the plaintiffs had any interest on the said property in view of the pleading by the second and third defendants that the first defendant had terminated the first agreement before entering into the second agreement; and

(ii) whether the second and third defendants were bona fide purchasers without notice of the plaintiffs' interest.

The learned trial judge decided in favour of the plaintiffs on the first issue when he held that the first agreement was not terminated and is still valid and effective. In his judgment the learned judge stated that the first defendant or the official receiver did not file their statement of defence and as such they failed to challenge the validity of the first agreement. He held that the first agreement was entered by the first defendant and the plaintiffs. The first defendant failed to challenge the validity of that agreement, it was not opened to the second and third defendants to challenge its validity since they were not parties to the agreement. Further, on the evidence adduced before him especially the evidence that the High Court, Johor Bahru in Civil Suit No. 308-1985 had decided on 1 February 1989 that the plaintiffs were entitled to specific performance of the first agreement, clearly indicated that the first agreement was still valid and effective. Though the judgment was served on all three defendants, no appeal or attempt was made by any of the defendants to set aside that judgment. In our view it would not be correct for the learned judge in the present action to hold otherwise. To do so would result in two conflicting orders being made. Despite that the learned judge went on to consider the merits based on the evidence adduced by the parties in particular the evidence of DW1 (Arthur Lee Meng Kwang). This witness was the solicitor for the first defendant at the material times. He gave evidence that on the instruction of the first defendant he sent a letter dated 17 July 1984 stating that the plaintiffs were in arrears in the sum of RM60,000 and interest thereon of the purchase price of the said property. The letter also stated that failure to pay the said sum would render the first agreement to be terminated and invalid. From the evidence it is not disputed that the letter was sent only to the first plaintiff and not to the second plaintiff. This letter was sent pursuant to cl. 9(2) of the first agreement which provides as follows:

> If the Purchaser fails to comply with any of the terms of this Agreement or if any of such unpaid instalments and interest remain unpaid for any period in excess of twenty-eight (28) days after its due date, the Vendor shall give the Purchaser or his Solicitors not less than fourteen (14) days notice in writing by A.R. Registered post to treat this Agreement as having been repudiated by the Purchaser and unless in the meanwhile such default and/or breach alleged is rectified or such unpaid instalments and interest are paid, this Agreement shall, at the expiration of the said notice, be deemed to be annulled.

> The learned trial judge then went on to consider the forfeiture by the first defendant of the sum already paid by the plaintiffs for the purchase. In his judgment the learned trial judge referred to cls 9(ii) and 9(iii) of the first agreement. Under those clauses the first defendant is entitled to forfeit only 10% of the total purchase price. The total purchase price of the said property under the first agreement was RM300,000. As such the learned judge found that the first defendant was entitled to the sum of RM30,000 from the total sum paid by the plaintiffs. The balance of the money paid was to be returned to the plaintiffs on the termination of the agreement. There was no dispute that the plaintiffs had paid the sum of RM160,000. It is imperative on the part of the first defendant to refund the sum of RM130,000 when the first defendant terminated the first agreement. Thus, if the first defendant had terminated the first agreement two weeks after 17 July 1984, no refund of the sum of RM130,000 to the plaintiffs was ever made until today. As can be seen the first defendant was wound up only on 17 August 1988 and as such there were no hindrances whatsoever for the first defendant to make the refund from 17 July 1984 to 17 August 1988. We agreed with the learned judge that the irresistible conclusion was that the first agreement was not terminated and if there was termination it was not effective.
>
> In view of the finding that the first agreement was still subsisting it was unlawful for the first defendant to enter into the second agreement with the second and third defendants in respect of the same property. It is clear to us that the second agreement was not lawful and should be set aside.

[17] In the instant case, there was no evidence in the appeal record that the letter of termination and notice of forfeiture was issued by the defendant. Therefore, I am of the view that the SPA between the plaintiff and the defendant was still subsisting when the defendant entered into the second SPA with the new purchaser. For the deposit, as there was no notice of forfeiture served on the plaintiff, the defendant is not entitled to forfeit the deposit.

[18] Under s. 56(1) of the Contracts Act which provides that when a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention

of the parties was that time should be of the essence of the contract (*Soon Yee Ling & Anor v. Lim Ah Hun* [2010] 2 CLJ 785).

[19] In this SPA time was of the essence as stipulated by cl. 2(a). It is true the plaintiff (purchaser) could not pay the balance purchase price within the time frame stipulated in the SPA. The plaintiff in good faith informed the defendant (vendor) of his inability to pay the balance purchase price and the defendant then had the option to terminate the SPA but did not do so thereby expanding the time for completion. I am of the view that up to this time the SPA between the plaintiff and the defendant was very much alive.

[20] Therefore, it is my considered view that the learned trial judge had erred in holding that there was no need for a notice of termination as the SPA had terminated by itself when the plaintiff did not honour one of the most important terms of the SPA. The term in question is the payment of the balance purchase price which resulted in the fundamental breach and therefore the defendant was entitled to forfeit the monies paid by the plaintiff. The learned trial judge in her grounds of judgment had said the following (pp. 19 & 20 record of appeal).

> Pada pendapat Mahkamah, tiada notis penamatan diperlukan kerana notis penamatan yang dinyatakan di bawah Klausa 9 adalah jika Defendan ingin melucuthakkan wang deposit yang dibayar oleh Plaintif. Dalam tindakan ini, perjanjian jual beli tidak ditamatkan oleh pihak-pihak tetapi ianya tamat dengan sendiri apabila satu terma terpenting tidak dipatuhi iaitu penyelesaian baki harga belian yang membawa kepada pemecahan asas perjanjian jual beli (fundamental breach).

[21] With respect, I beg to differ, as cl. 9 of the SPA states that ... "in the event the purchaser fails to pay to the vendor the balance sum or any part thereof in the manner and within the time stipulated in s. 2(b) of the Second Schedule thereto, this Agreement may be terminated by the vendor by notice in writing to the purchaser whereupon the vendor shall be entitled to forfeit absolutely the sum specified in s. 4 of the Second Schedule hereto as agreed liquidated damages."

[22] It is trite law that the parties are bound by the four corners of the contract that they entered into. And it was expressly stated in cl. 9 that in the event the purchaser fails to pay the balance

purchase price within the stipulated time the vendor may terminate the agreement by notice in writing and then (and only then) can the vendor forfeit the deposits and to resell the property to a third party. In this case the defendant (vendor) did not exercise his right to terminate as per the requirement of cl. 9 and therefore had no right to forfeit the deposit and no right to resell the property to a third party.

[23] The defendant knew very well of the need to give the notice of termination and that is why during cross examination the defendant claimed that a termination notice was purportedly sent to the plaintiff *vide* a letter dated 13 September 1995, however there was no evidence adduced of the purported termination notice.

[24] Based on the foregoing reasons in para. 22 and 23, I am also of the view that the learned trial judge, had erred when she said "Pokoknya perjanjian jual beli bertarikh 15 Februari 1995 tidak berupaya untuk diteruskan kerana kegagalan plaintif untuk menjelaskan baki harga belian" (at p. 20 record of appeal).

[25] I am in agreement with the plaintiff's submissions that, contrary to the learned trial judge's finding, the SPA did not terminate by itself. In fact the agreement was very much alive up to the time the defendant sold the said Property to a 3rd party on 3 September 1996. The plaintiff still could have, if he wanted to, paid the balance of the purchase price before 3 September 1996. However this was made impossible when the defendant sold the said Property to a third party while the agreement with the plaintiff was still subsisting.

[26] Based on the evidence, the defendant did not terminate the SPA when the plaintiff failed to pay the balance purchase price. By the defendant's failure to exercise his option to terminate the SPA time for completion was enlarged and the SPA was still alive when the defendant sold the said Property to a third party. It is wrong for the learned trial judge to make such a finding when there is an express provision in the SPA for termination and both parties are bound by the express term. Hence, the defendant was in breach of the SPA with the plaintiff when he sold the said Property to the third party on 3 September 1996 while the agreement with the plaintiff was still in force.

Whether The SPA Was Illegal And Therefore Void Pursuant To s. 24 Of The Contracts Act 1950

[27] On the third issue, whether the learned trial judge erred in holding that the SPA between the parties was void for illegality, in the ground of judgment, the learned trial judge said:

> Harga jualan hartanah itu adalah RM1.5 juta dan daripada jumlah itu adalah RM1.1 juta untuk rumah itu sendiri manakala RM400,000.00 adalah untuk perkakas dan perabot. Plaintif telah membayar sejumlah RM230,000. Dalam pemeriksaan balas, Plaintif telah ditanya apakah perkakas rumah dan perabot yang terdapat didalamnya yang bernilai hampir RM400,000.00 dan ini tidak dijawab oleh Plaintif …

[28] It is true that the total purchase price of the house was RM1.5 million arising out of two (2) different agreements, the 1st agreement for the purchase of the property for the sum of RM1.1 million ("SPA") and 2nd agreement for the purchase of furnitures and fittings for the sum of RM400,000 ("2nd Agreement"). The initial deposit on the SPA was RM110,000 paid upon signing the agreement and a further sum of RM120,000 towards the balance purchase price under the SPA was paid (pp. 106 and 116 record of appeal). Therefore, the plaintiff had paid a sum of RM230,000 under the SPA.

[29] During the cross examination, when asked what were the furnitures and fittings, the plaintiff said that there were furnitures and fittings but he could not remember and rightly so because more than 15 years had passed and the plaintiff cannot remember what items were in the said Property (p. 70 record of appeal). Therefore is was wrong of the learned trial judge to say "… ini tidak dijawap oleh plaintif"

[30] Further on p. 21 of the record of appeal, the learned trial judge said "Defendan di dalam keterangannya menjelaskan RM400,000 itu dipersetujui untuk dibayar oleh plaintif atas alasan untuk perabot dan perkakas rumah (sebenarnya menurut defendan rumah itu kosong) adalah sengaja diada-adakan untuk mengelak plaintif dari dikenakan atau diperlukan membayar duti stem yang tinggi. Oleh kerana asas kepada kemasukan RM400,000 sebagai sebahagian daripada harga keseluruhan hartanah adalah untuk mengelakkan cukai maka defendan mendakwa keseluruhan

perjanjian jual beli itu adalah tidak sah dan terbatal dan defendan bergantung kepada s. 24(b) dan (e) Akta Kontrak 1950. Oleh itu mana-mana kontrak yang asas kepada wujudnya balasan adalah melibatkan suatu pelanggaran undang-undang maka perjanjian itu adalah tidak sah dan batal."

[31] It was submitted by the plaintiff that the defendant did not plead illegality in his pleadings. The issue of illegality was only raised during the trial. It is settled law that parties are bound by the four corners of the pleadings (*Seven Seas Supply Co. v. Rajoo* [1965] 1 LNS 164) and (*State Government of Perak v. Muniandy* [1985] 1 LNS 117).

[32] In *Seven Seas Supply Co v. Rajoo supra*, the Federal Court held that as the defence of illegality was not pleaded and as all the relevant facts and this issue was not pleaded before the court, the court ought not on its initiative to refuse to enforce the contract on the ground of illegality.

[33] In the present case the learned trial judge did not have all the relevant facts on the issue of illegality except for what was raised by the defendant in his testimony during the trial.

[34] The learned trial judge further, in p. 21, said "Plaintif tidak menafikan atau mencabar defendan bahawa RM400,000 diwujudkan untuk harga perabot dan perkakas rumah hanya tujuan mengelak plaintif dari membayar duti setem yang tinggi. Tiada sebarang perjanjian berasingan yang dimasuki oleh pihak-pihak yang melibatkan perkakas dan perabot di dalam rumah itu."

[35] I agree with the plaintiff's submission that the reason the plaintiff did not rebut or challenge the defendant's allegation of illegality during cross examination was because the defence of illegality was not pleaded, it was therefore, not relevant and hence there was no reason to rebut the defendant's allegation. I find support for this in *Anjalai Ammal & Anor v. Abdul Kareem* [1969] 1 MLJ 22, where the Federal Court said at p. 24 para 1:

> … There is considerable authority in regard to the purpose and effect to Order 19, rule 7A Rules of the Supreme Court. At page 31 of *Halsbury* (3rd edition ed.) Vol 3, the learned commentator has this to say: "A party is bound by his pleadings unless he is allowed to amend them, and he is therefore bound by his particulars, which are in effect, part of the pleadings under which they are delivered".

A The court further held "… Therefore, in my opinion, the learned trial judge, in the instant case, had departed from the strict rules of procedure, in deciding the case on an issues not raised in the pleadings and on an assumption of a fact which the appellants were not obliged to call evidence to rebut."

B **[36]** Based on the above authorities, I hold that the learned trial judge had erred in holding that the SPA was void for illegality pursuant to s. 24 of the Contracts Act 1950.

[37] Further, as the issue of illegality only concerns the second C agreement even if I am wrong in holding that the agreements were not void for illegality, then only the 2nd agreement is illegal and not the 1st Agreement. The 1st agreement has been agreed between parties for an adequate consideration and there is no evidence to show that the value in the SPA is far below the D market value. Therefore, it cannot be said that it was illegal.

Whether The Plaintiff's Claim Is Time Barred

[38] The fourth ground is whether the learned trial judge erred in holding that the plaintiff's claim was time barred. The learned E judge had said at p. 23 of the record of appeal:

Dari eksibit P3, iaitu surat Plaintif kepada Defendan, ianya mengatakan seperti berikut "I remember vividly on 16.6.1995, I called you and informed that I was unable to pay you the said F balance and I was so relieved when you said, *inter alia*" I do not like to keep people's Money' which means you would refund the whole amount: Dari ayat di atas jelas, Plaintif percaya seawal 16.6.1995, beliau berhak untuk pemulangan deposit tersebut atau apa-apa wang yang telah dibayar kepada Defendan. Oleh itu kausa tindakan Plaintif terhadap Defendan wujud pada 16.6.1995 maka G 6 tahun dikira dari tarikh itu dan Plaintif sepatutnya memfailkan tindakan ini sebelum atau pada 16.6.2001 tetapi memfailkan tindakan pada 27.6.2002. Adalah jelas tindakan Plaintif ini telah dibatasi oleh had masa dan atas alasan ini sahaja, juga boleh Mahkamah menolak tuntutan Plaintif.

H **[39]** Under cl. 9 of the SPA, the purchaser may terminate the SPA if the purchaser did not pay the balance purchase price within the stipulated timeframe. In the present case the defendant as vendor did not exercise the option to terminate the agreement when the plaintiff informed him that he was unable to pay. I Therefore, as discussed earlier the agreement was still subsisting.

The plaintiff then agreed with the defendant that the defendant need only repay all the deposits paid once the defendant sells the said Property. On or about 3 September 1996 the defendant sold the said Property to a third party. Therefore, the liability to refund the deposits to the plaintiff occurred on or after that date when the defendant refused, failed and/or neglected to return the deposits back to the plaintiff.

[40] In the case of *The Great Eastern Life Assurance Co Ltd v. Indra Janardhana Menon* [2005] 4 CLJ 717 (p. 28-37 ABA); Siti Norma CJ speaking for the Federal Court stated at p. 724, "The law on when a cause of action accrues is already well settled and very much entrenched in our jurisprudence which is this. A cause of action founded on contract accrues on the date of the breach and that time begins to run from that breach". Her Ladyship had followed yet another Federal Court decision of *Nasri bin Mesah* [1970] 1 LNS 85.

[41] The learned trial judge had erred when she made a finding that the cause of action accrued when the plaintiff believed that he was entitled to a refund of the deposits, which is what the learned judge seemed to be saying when she said the following "… Dari ayat di atas jelas, plaintif percaya seawal 16 June 1995, beliau berhak untuk pemulangan deposit tersebut atau apa-apa wang yang telah dibayar kepada defendan. Oleh itu kausa tindakan plaintif terhadap defendan wujud pada 16 June 1995 …". There was no breach as at 16 June 1995. The breach occurred when the defendant, after selling the property to a third party on 3 September 1996, refused to return the sum of RM190,000 to the plaintiff. Therefore, the plaintiff's action was not barred by limitation when he filed his claims on 27 June 2002.

[42] Based on the foregoing reason, the plaintiff has every right to claim for the refund of the deposits paid after the defendant had sold the Property to a third party without terminating the SPA by failure to give notice of termination and forfeiture of the deposit.

[43] On the above premise, I allowed the plaintiff's appeal with cost for a sum of RM1,500 as agreed by the parties.